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No. 78-40

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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WESTERN OIL & GAS ASSOCIATION, ET AL., PETITIONERS

*v.*

STATE OF ALASKA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE SECRETARY OF THE INTERIOR

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WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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1. The State of Alaska and several other plaintiffs[1] filed suit to enjoin the Secretary of the Interior from issuing oil and gas leases covering portions of the Outer Continental Shelf (OCS) in the Northern Gulf of Alaska. Plaintiffs alleged that the Secretary had failed adequately to consider the environmental impact of issuing such leases, as required under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA) (Pet. App. 52a-53a). Petitioners Western Oil & Gas Association, and 11 of its petroleum company members who were seeking to acquire such leases, intervened in the district court as defendants (Pet. App. 52a).

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[1]The City of Yakutat, United Fishermen of Alaska, and the Cordova District Fisheries Union were also plaintiffs in the district court (Pet. App. 52a).

The district court denied plaintiffs' motion for a preliminary injunction to delay issuance of the leases and the court of appeals declined to grant an injunction pending appeal (Pet. App. 2a). Thereafter, the Secretary issued the leases on 76 off-shore tracts (Pet. App. 57a-58a). The case was then submitted to the district court for decision on the merits. The district court held that the Secretary had complied with the requirements of NEPA and entered a judgment dismissing the complaint (Pet. App. 2a, 65a).

On appeal, the court of appeals held that the Secretary had not fully satisfied the requirements of NEPA in two respects. First, the court held that the environmental impact statement (EIS) prepared by the Secretary had failed to give sufficient attention to the provisions of the Secretary's "operating orders" regulating the oil and gas extraction activities of the lessees (Pet. App. 25a-32a). The court directed the Secretary to prepare a supplemental EIS that would analyze alternative operating orders, and the Secretary is now complying with that portion of the court's decision. Petitioners do not seek review of this aspect of the decision of the court of appeals (Pet. 10 n. 7).

The court of appeals also concluded that the EIS was deficient because it failed to analyze the possibility of issuing leases containing "termination clauses" (Pet. App. 32a-42a). Such clauses would empower the Secretary to cancel a previously issued lease in the event that unanticipated environmental hazards developed as a result of oil and gas extraction in off-shore waters. The EIS had not addressed the use of such clauses because the Secretary then believed that the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, did not authorize cancellation unless the lessee violated the Act, the



Secretary's regulations, or the terms of the lease (Pet. App. 33a). The court of appeals concluded, however, that the Secretary's existing statutory authority permitted use of termination clauses, and that the Secretary should have evaluated such clauses in the EIS (Pet. App. 41a-42a).

The court's interpretation of the Secretary's authority purported to be wholly declaratory and prospective in nature (Pet. App. 40a, 42a, 45a). The court declined to require the Secretary to alter the leases previously issued, noting the "grave legal tangles" (Pet. App. 46a) that might result if the Secretary attempted to insert termination clauses in them. The court also declined to invalidate the leases previously issued (Pet. App. 42a-45a).

Petitioners contend in the petition for certiorari that the court of appeals erred in interpreting Section 5 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1334, because that provision does not authorize the Secretary to issue leases including termination provisions (Pet. 11-23).

2. Petitioners' objection to the interpretation of the court of appeals has been rendered moot by the passage of the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, signed into law on September 18, 1978. A copy of the relevant portions of the new Amendments is attached as an appendix hereto. Section 204 of the Amendments, amending Section 5 of the Act, grants the Secretary authority to adopt regulations providing for the cancellation of oil and gas leases due to serious harm or damage to the environment. The Amendments also direct the Secretary to promulgate regulations providing for compensation of lessees whose leases have been cancelled. Whether the court of appeals correctly interpreted the original statute is now irrelevant, since all future actions of the Secretary must comply with the amended statute which provides for lease cancellation.

There is no need for review by this Court of a lower court interpretation of a superseded statutory provision. See, *e.g.*, *Morris* v. *Weinberger*, 410 U.S. 422 (1973); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-116 (1920); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969); *Quinn* v. *Muscare*, 425 U.S. 560, 563 (1976).[2]

3. On September 18, 1978, petitioners filed a supplemental memorandum entitled "Petitioners' Memorandum In Response To Suggestion That The Cause Is Moot," which acknowledges that "the issue raised in the petition is now moot." Petitioners accordingly request that their petition be granted, that Part II-C of the decision below be vacated, and that the cause be remanded for dismissal of paragraph 37(j) of the complaint. We concur in that request in light of the mootness of the issue raised in the petition. See *Hall* v. *Beals*, *supra*, 396 U.S. at 50.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, Part II-C of the decision below vacated, and the case remanded to the district court for dismissal of paragraph 37(j) of the complaint.

WADE H. MCCREE, JR.
*Solicitor General*

SEPTEMBER 1978

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[2]The statutory amendments also render moot petitioners' challenge to certain regulations, issued by the Secretary during the pendency of this litigation, that provided for termination of leases under certain circumstances (Pet. 8-9, 11). Petitioners challenged those regulations in *Western Oil & Gas Association* v. *Andrus*, No. 77-3987 (C.D. Cal.), alleging that the regulations denied lessees just compensation in the event of lease termination. On August 2, 1978, the district court granted WOGA's motion for summary judgment and invalidated the regulations.



## APPENDIX

### AN ACT

To establish a policy for the management of oil and natural gas in the Outer Continental Shelf; to protect the marine and coastal environment; to amend the Outer Continental Shelf Lands Act; and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Outer Continental Shelf Lands Act Amendments of 1978".

* * * * *

### OUTER CONTINENTAL SHELF EXPLORATION AND DEVELOPMENT ADMINISTATION

SEC. 204. Section 5 of the Outer Continental Shelf Lands Act (43 U.S.C. 1334) is amended to read as follows:

"SEC. 5 ADMINISTRATION OF LEASING OF THE OUTER CONTINENTAL SHELF.—(a) The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or

maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

"(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

"(2) with respect to cancellation of any lease or permit—



"(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

"(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

"(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

"(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

"(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

"(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any,

over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

"(3) for the assignment or relinquishment of a lease;

"(4) for unitization, pooling, and drilling agreements;

"(5) for the subsurface storage of oil and gas other than by the Federal Government;

"(6) for drilling or easements necessary for exploration, development, and production;

"(7) for the prompt and efficient exploration and development of a lease area; and

"(8) for compliance with the national ambient air quality standards pursuant to the



Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this Act significantly affect the air quality of any State.

"(b) The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

"(c) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

"(d) Whenever the owner of any producing lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

"(e) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act) assuring maximum

environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

"(f)(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

"(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

"(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks



related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

"(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

"(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

"(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

"(g)(1) The lessee shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

"(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

"(h) The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

"(i) After the date of enactment of this section, no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.".